PD-1070-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/2/2020 4:16 PM
Accepted 3/3/2020 10:04 AM
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COURT OF CRIMINAL APPEALS
3/3/2020
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No. PD-1070-19
Court of Appeals No. 04-18-00856-CR
Trial Court No. B18-073

IN THE COURT OF

CRIMINAL APPEALS

AUSTIN, TEXAS

ROBERT LEE CRIDER, JR.,
Appellant,

vs.

STATE OF TEXAS,
Appellee.

FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO, TEXAS & 198TH JUDICIAL DISTRICT COURT, KERR COUNTY, TEXAS

APPELLANT'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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IDENTITY OF PARTIES & COUNSEL

Appellant certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this appeal:

Appellant:	Robert Lee Crider, Jr.
Appellee:	The State of Texas
Attorney for Appellant:	M. Patrick Maguire M. Patrick Maguire, P.C. 945 Barnett Street Kerrville, Texas 78028

Attorney for Appellee:	Hon. Scott Monroe 198th Judicial District Attorney 402 Clearwater Paseo, Suite 500 Kerrville, Texas 78028
Trial Judge:	Hon. Rex Emerson 198th Judicial District Judge 700 Main Street Kerrville, Texas 78028

INDEX OF AUTHORITIES

CASES

STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument would be helpful to the Court because the issues raised in Appellant's petition for discretionary review are issues of first impression.

STATEMENT OF THE CASE

Appellant, Robert Lee Crider, Jr., is appealing his conviction for the felony offense of driving while intoxicated (enhanced). CR, 125. Appellant was convicted of this offense by a jury on September 12, 2018. CR, 112. The trial court sentenced Appellant to 70 years in the Texas Department of Criminal Justice – Institutional Division on October 26, 2018. CR, 122. Appellant appealed the trial court's judgment to the Fourth Court of Appeals. On September 4, 2019, the Fourth Court of Appeals affirmed the trial court's judgment in an unpublished opinion authored by Justice Marion. *Appendix*.

SUMMARY OF THE ARGUMENTS

The law holds that when the government obtains a person's blood and then tests that blood, two discrete searches have occurred for fourth amendment purposes. Therefore, any warrant authorizing the drawing of blood must also expressly authorize the testing of blood. A warrant that fails to authorize both of these actions by the government is inadequate. The warrant in Appellant's case authorized a blood draw but failed to authorize testing of the blood. The Fourth Court of Appeals, therefore, erred in determining that the trial court failed to abuse its discretion in denying Appellant's motion to suppress.

APPELLANT'S ISSUE PRESENTED FOR REVIEW

I. In an issue of first impression, did the court of appeals correctly hold that a blood search warrant does not need to authorize both the drawing of blood and the testing of blood despite the Court of Criminal Appeals holding that the drawing of blood and testing of blood by the government are each discrete searches implicating a defendant's Fourth Amendment rights?

****** For purposes of reference in the Appellant's petition for discretionary review the following will be the style used in referring to the record:

1. Reference to any portion of the Court Reporter's Statement of Facts will be denoted as "(RR____, ____)," representing volume and page number, respectively.

2. The Transcript containing the District Clerk's recorded documents will be denoted as "(CR___, ___)."

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that this brief contains 3,538 words (counting all parts of the document and relying upon the word count feature in the software used to draft this brief). The body text is in 14 point font and the footnote text is in 12 point font.

/s/ M. Patrick Maguire
M. Patrick Maguire,
Attorney for Appellant

ARGUMENTS & AUTHORITIES

I.
In an issue of first impression, did the court of appeals correctly hold that a blood search warrant does not need to authorize both the drawing of blood and the testing of blood despite the Court of Criminal Appeals holding that the drawing of blood and testing of blood by the government are each discrete searches implicating a defendant's Fourth Amendment rights?

Statement of Facts

Trial Court

On October 3, 2017, Carson McCoy was driving on Harper Road in Kerrville, Texas when he noticed a vehicle driving erratically in front of him. RR 10, 222. The vehicle he was following was a green Dodge pickup with a large load of brush in the truck bed. Mr. McCoy observed that the vehicle would change speeds and had difficulty maintaining a single lane of traffic. RR 10, 224. Mr. McCoy also observed the vehicle come close to hitting some mailboxes along Harper Road. RR 10, 224. Mr. McCoy called 911 and reported his observations. RR 10, 225.

Mr. McCoy continued following the vehicle as it turned into the Walmart parking lot. RR 10, 228. Mr. McCoy observed the vehicle pull into a handicap parking spot in the Walmart parking lot. RR 10, 230-31. He remained on the phone with the 911 dispatcher until police arrived on the scene. RR 10, 232.

Officer Goodnight of the Kerrville Police Department arrived at the Walmart parking lot and made contact with Appellant who was seated inside the truck. RR 11, 19. Officer Goodnight testified that Appellant smelled strongly of alcohol. RR 11, 26. Appellant stated that he was unable to perform field sobriety tests due to burns he had recently sustained to his hands and torso. RR 11, 43. Officer Goodnight conducted the horizontal gaze nystagmus test (HGN) and detected 6 out of 6 possible clues on the HGN test. RR 11, 29. Based on Officer Goodnight's observations and the results of the HGN, Appellant was placed under arrest for driving while intoxicated.

Officer Goodnight obtained a search warrant to obtain a blood sample from Appellant. RR 13, *Defendant's Exhibit 1*. The warrant authorized officers to obtain a blood sample; it did not authorize an analysis of the seized blood. *Id*. Appellant was taken to the hospital where his blood was drawn and the blood sample was sent to the DPS lab for analysis. *Id*. The test results showed that Appellant's blood alcohol concentration was .19. CR, 43.

Appellant filed a motion to suppress the results of the blood analysis. CR, 48. Appellant argued that the blood test results were inadmissible because the search warrant only authorized officers to obtain a blood sample, and did not authorize an analysis of the blood for alcohol. CR, 50-51. The trial court denied Appellant's motion to suppress. RR 8, 33.

Fourth Court of Appeals

On appeal, Appellant argued that the trial court abused its discretion in denying Appellant's motion to suppress because the State failed to obtain a search warrant authorizing both the drawing and testing of a blood sample taken from Appellant. This argument is based upon the recent Court of Criminal Appeals' opinion in *Martinez v. State*, which recognizes a line of authority holding that where the drawing of a defendant's blood is instigated by the government, a subsequent analysis of the blood by government agents also constitutes an invasion of a societally recognized expectation of privacy. *Martinez v. State*, 570 S.W.3d 278, 284 (Tex. Crim. App. 2019). The search warrant in Appellant's case authorized only the drawing of Appellant's blood, not the testing of the blood.

On September 4, 2019, the Fourth Court of Appeals issued an unpublished opinion affirming the trial court's judgment. The Fourth Court held that Appellant "does not identify, and we are not aware of, any authority requiring that a search warrant authorizing the drawing of a blood sample must also expressly authorize testing and analysis of the blood sample." Although the Fourth Court acknowledged that "*Martinez* characterizes blood collection and blood testing as separate 'intrusions' or 'searches,' each implicating Fourth Amendment protections, we do not believe the *Martinez* court intended

to require specific authorization for testing where probable cause supports a warrant for blood collection." A true and correct copy of the Fourth Court's opinion is included in the attached *Appendix*.

An Analysis of a Blood Sample by Law Enforcement is a Discrete Search Separate from the Search to Obtain the Blood

State v. Martinez was decided by the Court of Criminal Appeals on March 20, 2019. In *Martinez*, the defendant was indicted for intoxication manslaughter. *State v. Martinez*, 570 S.W.3d 278, 281 (Tex. Crim. App. 2019). After the defendant was involved in a traffic accident, he was taken to a hospital where his blood was drawn by hospital staff in connection with their treatment of the defendant. *Id*. The State later acquired and tested the blood without a warrant. *Id*. The defendant filed a motion to suppress, arguing that the acquisition and testing of the blood violated his constitutional rights, including the protections against unreasonable searches and seizures under the Fourth Amendment of the United States Constitution and article 1, section 9 of the Texas Constitution. *Id*. at 281-82. After a hearing, the trial court granted the defendant's motion to suppress. *Id*. at 282.

In *Martinez*, the Court of Criminal Appeals took note of its past precedent holding that where the drawing of blood is instigated by the government, a subsequent analysis of the blood by government agents also constitutes an invasion of a societally recognized expectation of privacy. *Id*.

at 283 (citing *State v. Hardy*, 963 S.W.2d 516 (Tex. Crim. App. 1997); *State v. Huse*, 491 S.W.3d 833 (Tex. Crim. App. 2016); *State v. Comeaux*, 818 S.W.2d 46 (Tex. Crim. App. 1991)).

The ruling by the Court of Criminal Appeals in *Martinez* solidifies its decision in *State v. Comeaux*, 818 S.W.2d 46 (Tex. Crim. App. 1991). *Comeaux* was a plurality opinion where the Court of Criminal Appeals addressed essentially the same question as the Court decided in the *Martinez* case. *Comeaux*, 818 S.W.2d at 48. In *Comeaux*, the defendant was involved in a traffic accident and was taken to a hospital for treatment. *Id*. At the hospital, a sample of his blood was taken for medical purposes. *Id*. at 48. The DPS trooper investigating the accident wanted a sample of blood from Comeaux, even though there was no suspicion that Comeaux had consumed any alcohol and the trooper did not believe Comeaux was intoxicated at the time of the accident. *Id*. at 48. The State obtained a sample and had it tested at the DPS laboratory. *Id*. at 49. The trial court, the court of appeals, and a plurality of the Court of Criminal Appeals concluded that Comeaux's Fourth Amendment rights were violated. *Id*. at 48, 53.

Because *Comeaux* was a plurality opinion, it did not establish binding precedent. *See State v. Hardy*, 963 S.W.2d 516, 519 (Tex. Crim. App. 1997). Thus, the question of whether the State's testing of blood drawn for medical

purposes constituted a Fourth Amendment search remained unanswered. *Martinez*, 570 S.W.3d at 284. The Court of Criminal Appeals settled this question in *Martinez*. In *Martinez*, the Court unequivocally holds that the government's actions in subjecting a defendant's blood to testing at the DPS laboratory constitutes a search regardless of whether the blood was drawn pursuant to a warrant or pursuant to medical procedures unrelated to a criminal investigation. *Id*. at 292.

The Court drew a distinction between the blood itself and the blood's "informational dimension." *Id*. at 292. The "informational dimension" consists of the private facts contained in the blood. *Id*. at 289. In *Martinez*, the Court recognized a line of United States Supreme Court authority holding that a person has a legitimate expectation of privacy in these "private facts" contained within a blood sample, urine sample or DNA sample under the Fourth Amendment. *Id*. (citing *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989); *Maryland v. King*, 569 U.S. 435 (2013); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)). In analyzing this authority, the *Martinez* Court held "[w]e agree with Appellee's argument that the Supreme Court considers the analysis of biological samples, such as

blood, as a search infringing upon privacy interests subject to the Fourth Amendment." *Id*. at 290 (emphasis added).

The *Martinez* Court held "we believe the *Comeaux* plurality reached the correct result twenty-eight years ago when it considered the question we are faced with today. There are private facts contained in a sample of a person's blood beyond simple confirmation of a suspicion that a person is intoxicated. These private facts are those that a person does not voluntarily share with the world by the mere drawing of blood and may be subject to Fourth Amendment protection. We hold that there is an expectation of privacy in blood that is drawn for medical purposes." *Id*. at 291.

The Blood Warrant

The recently decided *Martinez* opinion is significant because it establishes a bright-line rule. Regardless of how the government obtains a blood sample—whether it is pursuant to a warrant or from a third-party that took the sample solely for medical purposes, any subsequent analysis of that sample by the government is a "search" under the Fourth Amendment that must be justified by a search warrant or a valid warrant exception.

Officer Goodnight's probable cause affidavit makes no mention of testing Appellant's blood for alcohol. The search warrant signed by the judge does not authorize the testing of Appellant's blood for alcohol. This is a fatal

defect because the law is clear that each discrete search—the drawing of blood and the subsequent testing of the blood—requires a warrant supported by probable cause.[1] *Martinez*, 570 S.W.3d at 292.

The Fourth Amendment prohibits the issuance of general warrants allowing officials to burrow through a person's possessions looking for any evidence of a crime. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). A warrant must particularly describe the place to be searched and the person or things to be seized. *Id*.; *Walthall v. State*, 594 S.W.2d 74, 78 (Tex. Crim. App. 1980).

In other words, the scope of the search is limited by the four corners of the search warrant. The search warrant signed by the magistrate in this case states that probable cause is established "for issuance of this warrant for seizure of blood from the person of Robert Lee Crider, Jr. and to carry the said person to a physician, registered nurse, or medical laboratory technician skilled in the taking of blood from the human body and the said physician, registered nurse, or medical laboratory technician shall take sample of the blood from the person of the said Robert Lee Crider, Jr. in the presence of a law enforcement officer and deliver the said samples to the said law

[1] A warrant authorizing a blood draw and an analysis of the blood must be obtained because the blood draw and the analysis each constitute a "search" under the Fourth Amendment. However, there is no reason why both of these elements could not be incorporated into a single warrant based upon a single probable cause affidavit.

enforcement officer." RR 13, *Defendant's Exhibit 1* (emphasis added). The four corners of the warrant do not authorize the officer to have the blood analyzed to determine Appellant's blood alcohol concentration.

The Analysis of Appellant's Blood Constituted a Warrantless Search

Because the blood draw and the analysis were both instigated by the government, there are two discrete searches at issue. *Martinez*, 570 S.W.3d at 292. The warrant in this case only focused on the first search—the blood draw. There is no mention made in either the probable cause affidavit, or in the warrant, regarding the subsequent analysis of the blood.

Appellant's Motion to Suppress

In his motion to suppress, Appellant argued that the search warrant to draw Appellant's blood was deficient because the officer who sought the search warrant only requested a blood sample and did not request to analyze the blood to determine the alcohol concentration within the blood. CR, 51. The officer never requested, nor did the warrant authorize, a subsequent analysis of the blood sample to determine the blood alcohol concentration. CR, 51. Appellant's motion to suppress argued that "[t]he affidavit in this matter only describes 'human blood' as the evidence to be searched for and does not describe the true evidence sought. The officer was not seeking human blood . . . The evidence sought was the alcohol particles within the

blood. The officer never described this evidence within the affidavit for search warrant for mere evidence . . ." CR, 51.

No Exceptions to the Warrant Requirement were Urged by the State

In the case of a warrantless search, the State has the burden of proof to show that a search was justified under one of the exceptions to the warrant requirement or show that Appellant voluntarily consented to such search by clear and convincing evidence. See *Reece v. State*, 1996 Tex. App. LEXIS 2572, 21-22 (Tex. App.—Dallas 1996, pet. ref'd) (unpublished opinion). The State did not raise any warrant exceptions in response to Appellant's motion to suppress.

Fourth Court's Analysis

The Fourth Court of Appeals' analysis focused on the narrow holding of *Martinez* while ignoring the broader implications of the opinion. The Fourth Court stated that "*Martinez* merely holds that an individual has an expectation of privacy not only in the blood in his body, but also in blood previously drawn for purposes other than police testing." In the next paragraph, the Fourth Court dismisses the recognition that the Court of Criminal Appeals has given to each discrete search, consisting of the initial blood draw by the government and the subsequent analysis by the government of the blood sample when it states "[a]lthough *Martinez* characterizes blood

collection and blood testing as separate 'intrusions' or 'searches,' *each implicating Fourth Amendment protections,* we do not believe the *Martinez* court intended to require specific authorization for testing where probable cause supports a warrant for blood collection." (emphasis added).

The Fourth Court recognizes the Court of Criminal Appeals holding that both the drawing and the testing of blood by the government implicates Fourth Amendment protections. The Court, however, then goes on to dismiss the necessity of a warrant to support the testing of blood drawn by the government. The Fourth Court's opinion leaves us with an irreconcilable conflict and essentially carves out a judicially-created exception to the warrant requirement.

Conclusion

The Fourth Court's opinion in this case decides an important question of state law that should be settled by this Court. The law holds that the drawing of blood and the testing of blood each constitute a discrete search for fourth amendment purposes. Therefore, a magistrate's warrant must expressly authorize both the drawing and testing of blood drawn by the government. A warrant that fails to authorize both of these actions by the government is facially deficient. Therefore, Appellant respectfully submits

that the Fourth Court erred in concluding that the trial court did not abuse its discretion in denying Appellant's motion to suppress.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Honorable Court sustain the appellate contentions herein, reverse the judgment of the Fourth Court of Appeals, and remand this cause to the trial court.

Respectfully submitted,

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ATTORNEY FOR APPELLANT, ROBERT LEE CRIDER, JR.

CERTIFICATE OF SERVICE

This is to certify that on March 2, 2020, a true and correct copy of the above and foregoing document was served on Hon. Scott Monroe, 402 Clearwater Paseo, Kerrville, Texas 78028 via electronic transmission at *scottm@198da.com* and that I have mailed a true and correct copy of the above and foregoing document to the State's Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

/s/ M. Patrick Maguire
M. Patrick Maguire

APPENDIX
Fourth Court of Appeals' opinion of September 4, 2019

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00856-CR

Robert Lee **CRIDER**, Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 198th Judicial District Court, Kerr County, Texas
Trial Court No. B1873
Honorable Rex Emerson, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: September 4, 2019

AFFIRMED

Appellant Robert Lee Crider ("Crider") appeals his conviction for felony driving while intoxicated (enhanced). In a single issue on appeal, Crider argues the trial court erred in denying his motion to suppress evidence. Because we conclude the trial court did not err in denying Crider's motion to suppress, we affirm the judgment.

Background

On October 3, 2017, a 911 caller reported a green Dodge pickup truck driving erratically, changing speeds, struggling to maintain one lane, and narrowly avoiding mailboxes along Harper

Road in Kerrville. The caller followed the pickup truck to Wal-Mart, where he observed it pull into a handicap parking space.

Kerrville Police Officer Kienan Goodnight was dispatched to the Wal-Mart parking lot, where he made contact with Crider—the driver of the pickup truck. Officer Goodnight observed that Crider smelled strongly of alcohol, had glassy and bloodshot eyes, exhibited slow and slurred speech, and was unsteady on his feet. Crider told Officer Goodnight he was unable to perform field sobriety tests due to burns he had recently sustained to his hands and torso. Officer Goodnight conducted a horizontal gaze nystagmus (HGN) test on Crider and detected six out of six possible indicators of intoxication. Based on the results of the HGN test, Officer Goodnight placed Crider under arrest for driving while intoxicated and prepared an affidavit for a search warrant to obtain a sample of Crider's blood. The trial court issued a search warrant authorizing the taking of a blood sample. Subsequent testing of the sample revealed Crider's blood alcohol concentration was .19.

Crider was indicted for felony driving while intoxicated, enhanced by multiple prior convictions. Crider filed a motion to suppress evidence obtained from the blood draw, which the trial court denied without making express findings of fact. A jury found Crider guilty of the charged offense, and the trial court sentenced Crider to seventy years' confinement. Crider appeals the trial court's denial of the motion to suppress evidence.

Standard of Review

We review the trial court's ruling on a motion to suppress using a bifurcated standard of review, giving almost total deference to the trial court's findings of historical fact and reviewing de novo the trial court's application of the law. *Furr v. State*, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016). When the trial court does not make express findings of fact, as here, we review the evidence in the light most favorable to the trial court's ruling and assume the trial court made

implicit findings supported by the record. *Id.* We will uphold the trial court's ruling if it is supported by the record and correct on any applicable theory of law. *Id.*

Discussion

In a single issue, Crider argues the trial court erred in denying his motion to suppress evidence because, while the State obtained a valid search warrant to draw a blood sample, the State did not obtain a warrant specifically authorizing testing and analysis of the blood sample. Relying on the court of criminal appeals' recent decision in *State v. Martinez*, 570 S.W.3d 278 (Tex. Crim. App. 2019), Crider argues the testing and analysis of blood evidence is a separate and discrete Fourth Amendment search requiring specific authorization in a warrant. Crider does not challenge the existence of probable cause to support the blood draw warrant.

In *Martinez*, the trial court granted a motion to suppress evidence obtained pursuant to the State's warrantless seizure and testing of vials of the appellant's blood that had been drawn at a hospital for medical purposes. *Id*. at 281. Affirming the trial court's decision, the court of criminal appeals held there is an expectation of privacy in blood drawn for medical purposes. *Id.* at 291. "[This] expectation is not as great as an individual has in the sanctity of his own body against the initial draw of blood. . . . But it is greater than an individual has in the results of tests that have already been performed on the blood." *Id.* Therefore, the court concluded the State's testing of the previously drawn blood was itself a Fourth Amendment search and seizure that was improper absent a warrant or an exception to the warrant requirement. *Id.* at 292.

Here, in contrast, police obtained Crider's blood sample pursuant to a valid search warrant. Although the warrant does not expressly authorize testing and analysis of the blood sample, *Martinez* does not require that it do so. Rather, *Martinez* merely holds that an individual has an expectation of privacy not only in the blood in his body, but also in blood previously drawn for purposes other than police testing. *See id.* at 291. Crider does not identify, and we are not aware

of, any authority requiring that a search warrant authorizing the drawing of a blood sample must also expressly authorize testing and analysis of the blood sample.

Although *Martinez* characterizes blood collection and blood testing as separate "intrusions" or "searches," each implicating Fourth Amendment protections, we do not believe the *Martinez* court intended to require specific authorization for testing where probable cause supports a warrant for blood collection. *See id.* at 290. Indeed, as the court observed, "'[c]ommon sense dictates'" that blood drawn for a specific purpose will be analyzed for that purpose and no other. *See id.* at 287 (quoting *State v. Comeaux*, 818 S.W.2d 46, 52 (Tex. Crim. App. 1991)). In this case, Officer Goodnight's affidavit for a search warrant expressly requests a blood sample "constitut[ing] evidence that the offense [driving while intoxicated] was committed and that [Crider] committed the offense[.]" Just as a person who has given a blood sample for private testing reasonably can assume that sample will not be turned over to the State for another purpose, we reasonably can assume that where the police seek and obtain a blood draw warrant in search of evidence of intoxication, the blood drawn pursuant to that warrant will be tested and analyzed for that purpose.

Absent any authority requiring specific authorization for testing and analysis of blood drawn pursuant to a valid search warrant, we conclude the trial court did not err in denying Crider's motion to suppress. Crider's sole issue on appeal is overruled.

Conclusion

Having overruled Crider's sole issue on appeal, we affirm the trial court's judgment.

Sandee Bryan Marion, Chief Justice

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